UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30th day of January, Two Thousand Six.

PRESENT: HON. PIERRE N. LEVAL,
HON. CHESTER J. STRAUB,
HON. PETER W. HALL, Circuit Judges.

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GEN LIN, Petitioner,

-v.- No. 03-40940-ag

ALBERTO GONZALES, Respondent.

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A petition for panel rehearing having been filed herein by Gen Lin

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

For the Court,
Roseann B. MacKechnie, Clerk
By: Tracy W. Young,
Motion Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of November, Two Thousand and Five.

PRESENT: HON. PIERRE N. LEVAL,
HON. CHESTER J. STRAUB,
HON. PETER W. HALL, Circuit Judges.

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GEN LIN, Petitioner,

-v.- No. 03-40940-ag

ALBERTO GONZALES, Respondent.

----------X

FOR APPELLANT: Ramesh K. Shrestha, New York, New York.

FOR APPELLEE: Michael J. Butler, Assistant United States Attorney, Office of the United States Attorney for the Middle

District of Pennsylvania (Thomas A. Marino, United States Attorney for the Middle District of Pennsylvania, on the brief), Tallahassee, Florida.

UPON DUE CONSIDERATION of this petition for review of the Board of Immigration Appeals (" BIA") decision, it is hereby ORDERED, ADJUDGED, AND DECREED that the decision of the BIA be and it hereby is AFFIRMED.

Gen Lin, through counsel, petitions for review of the BIA decision affirming the Immigration Judge's ("IJ") decision denying his application for asylum and withholding of removal. We assume the parties' familiarity with the underlying facts and procedural history.

This Court reviews an the BIA's factual findings under the substantial evidence standard, and as such, "a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales v. INS*, 331 F. 3d 297, 307 (2d Cir. 2003) (quoting *Diallo v. INS*, 232 F. 3d 297, 287 (2d Cir. 2000)). The same standard of review applies to the denial of withholding of removal under the INA and the CAT. *See Melendez v. United States Dep't of Justice*, 926 F. 2d 211, 218 (2d Cir. 1991).

In this case, the BIA's eligibility determination was supported by the record as a whole. The BIA correctly pointed out that Lin had presented no evidence sufficient to demonstrate the requisite fear of persecution based on any of the grounds enumerated in the INA.

For the Court,
Roseann B. MacKechnie, Clerk

By: _____

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

File: A77 322 660 - New York City Date: Sept. 30, 2003

In re: GEN LIN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ramesh K. Shrestha, Esquire

ON BEHALF OF DHS: Toria L. Dixon
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document.

APPLICATION:

Asylum; withholding of removal; protection under the Convention Against Torture

The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has appealed the Immigration Judge's decision dated August 9, 2001, granting the respondent's request for asylum. The appeal is sustained.

We agree with the DHS that a showing of past persecution has not been made on this record. The respondent, a native and citizen of the People's Republic of China ("PRC"), contends that he violated the Chinese army recruitment law by refusing to serve based on his personal and political beliefs.[1] The Immigration Judge expressly found him to be credible. *See* I.J. at 6. It is well settled, however, that a sovereign government has a right to require military service of its citizens and to enforce that requirement with reasonable penalties. *See Matter of Vigil*, 19 I&N Dec. 572 (BIA 1988), and the cases cited therein; *see generally Rodriguez-Rivera v. INS*, 848 F.2d 998 (9th Cir. 1988). Moreover, the respondent has not been shown that any punishment he might be subjected to for refusing to serve would be excessive, or that it would be imposed on account of his race, religion, nationality, membership in a particular social group, or political opinion.

Regarding the occurrences in September 2000, although the respondent was arrested and detained for 1-day during which time he was severely beaten and injured,[2] it has not been established that this mistreatment was inflicted on account of an enumerated ground. The respondent indicated he was released after the

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[1] We accept the respondent's claim in this regard in light of the Immigration Judge's favorable credibility finding even though it is not clear from the record when and under what circumstances the respondent articulated his refusal to serve. He did, however, testify that he was ordered by the Chinese military authorities to report for a health exam on October 11, 1999, a month after his 21st birthday. He passed the exam and was informed that he was qualified to serve in the military (Tr. at 22-26, 42-43). He was told to wait for notification regarding when to report for duty, but he did not receive any such notice from the military authorities and was never actually inducted. (Tr. at 42-43). He was opposed to serving in the military and contends that the authorities knew of his views in this regard (Tr. at 24-26, 34, 36).

[2] The Immigration Judge found that during this detention, the respondent has been "viciously beaten and tortured by government officials." *See* I.J. at 6. Although the respondent was severely beaten, the treatment he received does not rise to the level that can be considered "torture." *See* 8 C.F.R. § 1208.18(a) (2003) (defining "torture").

authorities informed him that he had been mistaken for someone else (Tr. at 28). Regarding the September 14, 2000 visit to his home by public security officials ostensibly to arrest him, the respondent was not at home at the time and in any event was persecuted.

The Immigration Judge granted asylum after finding that the respondent has a well-founded fear of persecution on account of an anti-government opinion being imputed to him. *See* I.J. at 6. The Immigration Judge based this conclusion on the fact that public security officials sought to arrest the respondent the day after he attempted to file a complaint based on the mistreatment he received at their hands his arrest and detention. However, when considered as a whole, the record does not adequately support a finding of a well-founded fear of persecution on account of an enumerated ground.

The respondent advances several reasons for not wanting to return to his homeland. At his airport interview, he indicated that he feared being "fined heavily" by the Chinese authorities and being "imprisoned because I left China without a passport and I am returning to China without a passport." *See* Exh. 10, p. 4. In his credible fear interview, he contended that he would be tortured if he were arrested and detained by the Chinese government because he left his homeland illegally. *See* Group Exh. 13. In his statement attached to his asylum application, he claims that if he were sent back to China, he would be charged criminally with "'Illegally Crossing National Border'" and sentenced up to 3 years in jail." *See* Group Exh. 2. He goes on to express a fear of being tortured and even dying in jail in the future because he attempted to file an improper arrest/police brutality complain in the past. *Ibid.*

In his hearing testimony, the respondent expressed a fear of being arrested again by the Chinese authorities, but he explicitly stated that the reason the authorities would seek to arrest him again was because he did not want to join the army (Tr. at 36-37). He also stated that he did not want to return to the PRC because he

could be fined and imprisoned because he was "illegally smuggled" and also because he does not have a passport (Tr. at 39-40). Finally, he claims that the public security bureau issued a summons ordering his appearance because he violated the army recruitment laws. (Tr. at 46). *See* Exh. 6 (copy of public security bureau summons). Although it is true that he also contends that the timing and issuance of this summons was triggered by his having attempted to file a complaint against public security officials the day before, he maintains that the substantive basis for the summons was, and his future arrest would be, premised on his violation of the army recruitment laws, which he admittedly violated.

At most, the evidence presented establishes that the respondent fears being persecuted upon returning to the PRC because he violated that country's army recruitment laws, he illegally departed his homeland, and he did not or does not have a passport. However, on this record none of these reasons establishes that his fears of being persecuted in the PRC are on account of a ground protected by the Immigration and Nationality ("Act"). Further, when considered in its totality the evidence does not adequately establish a well-founded fear of persecution based on political opinion, actual or imputed, premised on a future arrest because he attempted to file an improper arrest/police brutality complaint in the past.

On this record, the respondent has failed to satisfy the lower burden of proof for purposes of asylum eligibility; correspondingly the higher burden of proof for purposes of establishing withholding of removal eligibility has not been satisfied. *See generally INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *INS v. Stevic*, 467 U.S. 407 (1984); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). In addition, the evidence presented does not demonstrate the respondent's eligibility for protection under the Convention

Against Torture. *See Matter of M-B-A-*, 23 I&N Dec. 474 (BIA 2002); *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002).[3]

Accordingly, the appeal of the DHS is sustained.

ORDER: The appeal is sustained.

FURTHER ORDER: The Immigration Judge's order dated August 9, 2001, is vacated insofar as it granted asylum.

FURTHER ORDER: The respondent's requests for asylum, withholding of removal, and for protection under the Convention Against Torture are denied.

FURTHER ORDER: The respondent shall be removed from the United States to the People's Republic of China, his country of citizenship, on the charge set forth in the Notice to Appear.

FOR THE BOARD

[3] Since the respondent was not physically present in the United States for at least 1 year prior to service of the Notice to Appear, he is statutorily ineligible for voluntary departure. *See* section 240B(b)(1)(A) of the Act, 8 U.S.C. § 1229c(b)(1).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
New York, New York

File No.: A 77 322 660 August 9, 2001

In the Matter of	)	
	)	
GEN LIN	)	IN REMOVAL PROCEEDINGS
	)	
Respondent	)	

CHARGE: Section 212 (a)(7)(A)(i), Immigration and Nationality Act - immigrant who is not in possession of a valid unexpired immigrant visa.

APPLICATIONS: Section 208, Immigration and Nationality Act - asylum. Section 241(b)(3), Immigration and Nationality Act - withholding of removal. Article III of the Convention Against Torture.

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE SERVICE:
Ramesh Shresthra, Esquire	Torri Dixon, Esquire
377 Broadway, Number 801	Asst. Dist. Counsel
New York, New York 10013	New York District

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male, native and citizen of the People's Republic of China (PRC) who arrived in the United States on or about September 21, 2000.

The respondent admitted the truthfulness of the factual allegations contained in the Notice to Appear (Exhibit 1) and conceded removability. Based upon the respondent's admissions, removability has been established by clear, convincing, and unequivocal evidence. *Woodby v. INS*, 385 U.S. 276 (1966).

Because the respondent declined to designate a country of removal, the Court designated the PRC should such action become necessary.

As relief from removal the respondent submitted an application for asylum pursuant to Section 208 of the Act (Exhibit 1), which is also considered a request for withholding of removal pursuant to Section 241(b)(3) of the Act. The respondent also has requested relief pursuant to Article III of the Convention Against Torture.

The respondent's application for asylum was forwarded to the Department of State for an advisory opinion.

To be eligible for asylum, the respondent must establish a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group political opinion. For withholding he must show a real likelihood or a clear probability that his life or freedom would be threatened for the same reasons. Relief is discretionary under Section 208 and mandatory under Section 241(b)(3). *Cardoza-Fonseca v. INS*, 480 U.S. 421 (1987); *INS v. Stevic*, 467 U.S. 407 (1984).

The Board of Immigration Appeals has stated that an applicant has established a well-founded fear if a reasonable person in his circumstances would fear persecution. *Matter of Mogharrabi*, Int. Dec. 3028 (BIA 1987). It has been held in *Mogharrabi* that the alien's own testimony can "suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear."

The respondent testified that he was born on September 11, 1978 in Guang Tou, China. He said that he is not married and has no children.

He left China on September 21, 2000. He said he suffered persecution from the Chinese government.

He said in 1999 he had a notice for army recruitment and he had to go for a physical examination and he passed it. He said he did not want to join the army and he had violated the army recruitment law of China. He said at the time the relations between the Chinese government and Taiwan was very intense and he did not want to go. He said if a war started, people like him would have to go to the war and he didn't want to see Chinese fight against Chinese.

He said on September 11, 2000, on his birthday, he was walking home from celebrating his birthday with his friends. He was by himself at this time. He said the public security bureau officials came up to him about 11:30 p.m. and saw him walking alone. They came to question him and asked him if he had his national ID card. He did not have it with him when he was asked to produce it.

He said he was thereupon apprehended and driven to the Guang Tou public security branch. There he was held in custody and he was beaten and he was asked if he was a certain person. He did not know this person's name but they said that he looked like him. He said three separate officials beat him. They punched him and they kicked him. Later after he started bleeding, they hit him with an electric stick. He was beaten for about 10 minutes. He had injuries from this. He was held for a day. He was released in the middle of the night on the 12th of September. They said to him that they had mistaken him for someone else. He went for medical attention to a Chinese traditional doctor.

He went to file a complaint at Lian Jiang People's Court against the public security bureau the next day. He said he spoke to someone named Huang. This person asked the respondent if he had any evidence available to make the complaint. The respondent told the person that his injuries had been caused by the public security officials beating him. This person told him that they couldn't be sure that the injuries were caused by the beating and the respondent's complaint was not accepted so he had to go home.

Early the next morning, someone tipped off his mother that the public security office was coming to arrest the respondent. She had a friend who worked for the village and this friend told the respondent's mother that the officials were coming. The respondent's mother told him to flee and he did. At 10:00 a.m. the public security officials arrived to arrest the respondent. They said that he had tried to make a complaint against them. They also said that he had been supposed to join the army in September 1999 and he had violated the army recruitment laws. They also said that he had told his friend not to join the army. They asked the respondent's mother where the respondent was and they destroyed furniture, kitchenware and windows in the house.

The respondent remained in China until September 21, 2000 when he left. He was afraid that the public security bureau would arrest him again. He said he did not want to join the army. He said to them it is like he is pro-Taiwan and has a different opinion from the government.

The officials issued a summons and his mother received it. The respondent was at a friend's house in the neighborhood but was not at home. His mother later showed it to him. He was supposed to report to the Guang Tou branch of the public security bureau on September 15th. The respondent does not believe it is safe for him to return. He believes he would be subject to beating, imprisonment and being fined.

He said he did not tell the INS on his arrival about violating army recruitment laws because he was nervous and scared. He said military service is mandatory in China.

He said when he made the complaint against the public security officers that it made them very unhappy and this triggered his summons.

I listened to the testimony of the respondent and I reviewed the documentary evidence. The Court finds that the respondent testified credibly. His testimony was very detailed and it was consistent with his asylum application. It was also corroborated by

documentary evidence. This is not a case of mere refusal to serve in a country's army. It is well settled that that is not a valid basis for asylum in this country. However, the respondent has established a well-founded fear of persecution on account of political opinion. After he was mistakenly viciously beaten and tortured by government officials, he attempted to file a complaint against them. Right after that, government officials came to his house to arrest him. In China, making a complaint against the government is clearly considered to be an anti-government action. A reasonable person in the respondent's position certainly would have reason to fear persecution under these circumstances.

Because the Court is granting asylum, the Court finds it unnecessary to consider the respondent's other claims for lesser relief.

Therefore, the following order will be issued:

ORDER

IT IS HEREBY ORDERED that the application for asylum be granted.

TERRY A. BAIN
August 9, 2001
United States Immigration Judge